No. 87-1350

In the

Supreme Court of the United States

OCTOBER TERM 1988

O.N.E. SHIPPING, LTD.,

Petitioner,

against

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents,

PETITIONER'S RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

RICHARD H. WEBBER, *Counsel of Record*
CASPAR F. EWIG
HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY
21 West Street
New York, New York 10006
(212) 825-1000

BARRY E. HAWK
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

Other Authorities:

In the

Supreme Court of the United States

OCTOBER TERM 1987

O.N.E. SHIPPING, LTD.,

Petitioner,

against

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents,

PETITIONER'S RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Statement

As *amicus* recognizes, petitioner O.N.E. does not challenge Colombia's laws and regulations. These are simply part of the context within which the challenged conduct occurred. Petitioner claims a broader unlawful conspiracy to raise rates and exclude competitors. This broader unlawful scheme antedated Colombian approval of the 1973 and 1976 Agreements and continued after those Agreements.

Discussion

The district court dismissed petitioner's action on the ground that it had "no jurisdiction . . . because of principles of [international] comity" (Pet. App. A29), stating among other things that Colombian interests outweighed United States interests. The district court appeared to find, however, that petitioner adequately alleged a direct, substantial and reasonably foreseeable effect on U.S. export or

domestic commerce as required under the Foreign Trade Antitrust Improvements Act of 1982 (FTIA) (15 U.S.C. § 6a). Petitioner argued on appeal that, once the requisite effects were alleged, it was improper to decline jurisdiction based on a "balancing" of U.S. and foreign interests in favor of the latter. The circuit court did not address the FTIA issue,[1] but dismissed the action on the basis of the Colombian laws and regulations and the policies underlying them. In so doing, the circuit court referred to comity and the act of state doctrine. Thus the circuit court's holding is more in the nature of a defense or immunity separate from the threshold issue of subject matter jurisdiction.

The United States as *amicus* agrees that there were several errors in the decision below and that petitioner's claims should not have been dismissed. The *amicus*'s further conclusion that the case is inappropriate for certiorari review is unpersuasive, however. The circuit court below decided important questions of law, contrary to this Court's precedent, concerning a common and significant situation—business conduct involving foreign government laws or policies. The circuit court decision effectively creates a new immunity from the antitrust laws for private firm conduct simply on a finding that the antitrust claim implicates foreign laws or policies, even where significant U.S. antitrust and maritime policies would be furthered by the taking of jurisdiction.

As *amicus* states, the circuit court's immunity doctrine is contrary to this Court's decision in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Those decisions instruct that an antitrust claim does not fail merely because the challenged conduct involves foreign laws and policies; mere compliance with foreign law does not preclude antitrust liability. These decisions and the

[1] The dissenting judge expressly upheld jurisdiction and petitioner's standing under the FTIA.

domestic state action decisions[2] express the concern that private firms not avoid antitrust sanction by cloaking essentially private unlawful schemes under government involvement. The circuit court disregards that concern. As a former Legal Adviser to the State Department points out, "the court suggests that if a lawsuit directly implicates a foreign government's motives or actions, jurisdiction should not be exercised no matter what the strength of U.S. interests in pursuing the suit."[3]

The decision below has wide precedential scope and will not be limited to the pleadings or facts of the present case as *amicus* suggests. The circuit court formulated the immunity in absolute terms, *i.e.*, courts should dismiss claims where foreign laws or policies are implicated. The circuit court did not limit the immunity to antitrust claims that merely challenge the validity of foreign laws, although the circuit court misinterpreted petitioner's claims to that effect. The decision below will lead other courts to dismiss antitrust claims simply on a finding or assertion that foreign laws or policies are involved with no weight given to relevant U.S. laws and policies or the *Midcal*

---

[2] *E.g., Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

[3] Leigh, *Judicial Decisions,* 82 Am. J. Int'l L. 351, 353 (1988).

Neither *Continental Ore* nor *Sisal Sales* is distinguishable, as *amicus* implicitly concludes. As here, in both cases a broader conspiracy or monopolistic scheme was alleged and effects on U.S. commerce were shown or alleged. The location of the act of conspiring and the nationality of the parties are not determinative and do not distinguish *Sisal Sales* from the instant case. The important U.S. antitrust and maritime interests at stake in the case at bar are no less important than the antitrust interests at stake in *Sisal Sales* and *Continental Ore.* The Colombian legislation is no more the gravamen of petitioner's complaint than it was in *Sisal Sales.* Colombia's laws and regulations, like the Mexican and Canadian laws and regulations in *Sisal Sales* and *Continental Ore,* are simply part of the context within which the challenged conduct occurred. Indeed, the discriminatory legislation in *Sisal Sales* was more intimately involved in the antitrust claims than the Colombian laws and regulations.

concern, thus eroding this Court's decisions in *Sisal Sales, Continental Ore* and *Midcal.*

The damaging precedential effect of the decision below can be seen already in the one opinion to rely on it. A district court interpreted the circuit court decision below to permit a court to decline jurisdiction "under principles of international comity" even where the jurisdictional requirements of the FTIA are met. *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988).[4]

Any ambiguity in the circuit court decision below concerns the basis for its new foreign immunity defense. This is secondary to the issue whether that immunity is contrary to Supreme Court precedent. Doubts about the circuit court's rationale makes certiorari review even more appropriate.

The circuit court's foreign immunity defense is not supported on "comity" or act of state doctrine grounds.

Dismissal of antitrust claims simply on the assertion that foreign government laws or policies are involved, even though important U.S. antitrust and maritime policies would be furthered by the taking of jurisdiction, is a perverse misuse of the concept of comity. Dismissal is inconsistent with this Court's admonition that comity does not require deference to foreign laws and policies that are contrary to the forum state's significant public policies.[5]

---

[4] The district court cited the decision below for the proposition that where "there is a direct conflict between the United States [and the foreign government], the continuance of which could clearly exacerbate the stated differences between the two countries, the proper course seems clearly to be to 'avoid the unnecessary irritant of a private antitrust action' by declining jurisdiction." 678 F. Supp. at 1079. The same court also relied on the decision below to dismiss antitrust claims on the basis of the act of state doctrine.

[5] *See, Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895).

The extreme position taken in the decision below under which dispositive deference is accorded foreign government interests conflicts with the case law of other circuit courts. The decision below conflicts with the D.C. Circuit's decision in *Laker* holding that U.S. courts may not decline antitrust jurisdiction on the ground that foreign interests are deemed to outweigh U.S. interests.[6] Moreover, the decision below failed to engage in any meaningful balancing analysis and thus conflicts with circuit court decisions (*see, e.g., Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976)) that call for a "balancing" of U.S. and foreign interests. Assuming *arguendo* that such a balancing is appropriate, the circuit court decision should be reversed because it failed to balance at all.

The decision below is also in error to the extent that it relies on the possible adverse effect on U.S. foreign relations should jurisdiction be taken. Whether or not this is an appropriate factor in general,[7] dismissal is unjustified where as here there is no evidence of such an effect beyond the foreign laws and policies themselves and where as here the Executive has foregone several opportunities to advise the court that the suit is adversely affecting the United States' conduct of foreign relations.

The act of state doctrine also fails to support the circuit court's foreign immunity defense. As the *amicus* concludes, there is no basis whatsoever for application of the act of state doctrine in the present case. Petitioner is not challenging, directly or indirectly, the validity of the Colom-

---

[6] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

[7] For example, if courts consider immediate foreign policy concerns, inconsistent and *ad hoc* rulings which may depend to an unacceptable degree on case-specific foreign policy concerns will result. *See*, 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.18 (2d ed. 1981); 1 B. Hawk, *United States, Common Market and International Antitrust* 151 (2d ed. 1987).

bian laws and regulations; there is no Colombian act of state at issue. Moreover, there is no evidence with respect to any possible adverse effect on foreign relations.

Amicus argues that the decision below does not squarely raise the question whether the act of state doctrine precludes inquiry into foreign government motivation as well as validity of foreign acts of state. It is true that petitioner's claims do not require an inquiry into the motivations of the Colombian government and that petitioner's injury did not result directly from the action of the Colombian government. However, the circuit court's foreign immunity defense requires courts to identify and evaluate asserted foreign interests and policies. Thus the Colombian government's motivations are relevant in that the circuit court relies on Colombian policies and the reasons underlying the cargo reservation laws to dismiss the antitrust claims. Of course this reliance itself contradicts the circuit court's statement that the act of state doctrine precludes inquiry into the foreign state's "policies, and the underlying reasons and motivations for the actions of the foreign government." (Pet. App. A8) This internal contradiction reveals further the lack of a principled basis for the circuit court's foreign immunity defense.[8]

Because the decision below does not deal with the validity-motivation issue in a narrow sense, the case is a more appropriate vehicle for this Court to clarify the status of the act of state doctrine in antitrust cases, *i.e.*, "as it relates to anticompetitive schemes that depend, at least in part, on procurement of a foreign sovereign act." *Amicus* Brief at p. 16 n. 17.[9]

---

[8] The circuit court's reliance on *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), together with its baseless and cryptic references to the foreign sovereign compulsion defense and the Foreign Sovereign Immunities Act illustrate further the flawed rationale of the newly created foreign immunity defense.

[9] The act of state doctrine was raised for the first time only on

(*footnote continued on following page*)

The decision constitutes reversible error where it suggests that the foreign sovereign compulsion defense precludes an antitrust claim even where there is no evidence of actual compulsion. This is squarely contrary to the case law which requires proof of actual compulsion; acquiescence, approval or delegation of authority is not sufficient.[10] The foreign sovereign compulsion defense's policy consideration of fairness to the compelled party and the *Sisal Sales-Midcal* concern require actual compulsion.

Important and unsettled issues of law would be resolved if the Court granted certiorari, construed petitioner's allegations differently and remanded on that basis. The decision below declares in absolute terms a legal standard of antitrust immunity. Further facts are not necessary to review for error such a legal standard.[11] Even if the Court

---

(footnote continued from preceding page)

appeal by defendant Flota. The circuit court should not have invoked the doctrine until the district court heard the views of the Executive, entertained fuller arguments from the parties and permitted discovery. At the minimum, the issue of the act of state doctrine should have been remanded to the district court.

[10] *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). *Cf., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[11] This case, unlike the case of *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (70 S.Ct. 710) 1959, will definitely be affected by resolution of the issue for which certiorari would be granted. In *The Monrosa, supra,* the Court, after realizing that the *in rem* action would continue in the United States courts even though the *in personam* action might be relegated to the courts of Italy by reason of a forum selection clause, held that a determination of the issue whether a bill of lading clause could validly transfer an *in personam* action was only abstractly presented since the parties would achieve the same result by continuing to pursue their *in rem* action against the vessel in the United States. That case is patently not analogous to the situation here where a determination of the issues will have a definite effect upon the continued prosecution of the litigation.

were to review the circuit court's immunity defense as an overly broad rule, remand would permit development of further facts and legal arguments relevant to drawing the line under a more nuanced standard to determine antitrust liability for business conduct involving foreign laws and policies.[12]

---

[12] The *amicus*'s suggestion that "it is not inconceivable that the limited effect of respondents' actions within the United States and other factors would combine to justify dismissal based on a lack of jurisdiction" (*Amicus* Brief at p. 19) is unpersuasive. As Judge Cardomone dissenting rightly concludes, subject matter jurisdiction exists under the FTIA given the direct, substantial and reasonably foreseeable effects of respondents' scheme on U.S. commerce. Even if the Court adopted a more nuanced jurisdictional test (for example, requiring a "balancing" of U.S. and foreign interests and consideration of factors linking the claims to the United States such as the location of the challenged conduct and its effects), the appropriate remedy would be remand for further factual development.

Furthermore, *amicus* is incorrect in its understanding that petitioner has rights to carry cargos reserved to Colombian or associated carriers (See *Amicus* Brief p. 8 n. 10). Except to the extent that enforcement of the Reservation Laws can be waived in specific instances, petitioner did not obtain any such rights as a result of its FMC proceeding under § 19 of the Merchant Marine Act (46 U.S.C. § 876).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD H. WEBBER, *Counsel of Record*
CASPAR F. EWIG
HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY
21 West Street
New York, New York 10006
(212) 825-1000

BARRY E. HAWK
Of Counsel

October 1988